SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

January 16, 2007

Lester J. Hickman
SBI No.
Delaware Correctional Center
P.O. Box 500
Smyrna, DE 19977

RE: State of Delaware v. Lester J. Hickman
Def. ID# 0104000979
Memorandum Opinion - Motion for Postconviction Relief

Dear Mr. Hickman:

This is my decision on your second motion for postconviction relief. You were convicted of Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, Maintaining a Dwelling for Keeping Controlled Substances, Possession of Drug Paraphernalia and Possession of Cocaine. The conviction for Possession of Cocaine was vacated by the Supreme Court.[1] The Supreme Court remanded your case to me for resentencing. I resentenced you on July 19, 2002. You did not file another appeal. You now claim that the toxicology report on the cocaine that was prepared by F. Daneshgar ("Daneshgar") was inadmissable hearsay and violated your constitutional right to confront the witnesses against you.

Your claim is barred by Superior Court Criminal Rule 61(i)(1). This rule provides that a "motion for postconviction relief may be not filed more than [three years] after the judgment of

[1] *Hickman v. State*, 801 A.2d 10 (Table), 2002 WL 1272154 (Del. Supr.).

conviction is final..."[2] Prior to a change in Rule 61 that became effective on July 1, 2005, the time limit to file a motion for postconviction relief was three years. Therefore, your deadline for filing a motion for postconviction relief was July 19, 2005. You filed your first motion for postconviction relief on December 1, 2003. I denied it on February 6, 2004. You filed your second motion for postconviction relief on October 5, 2006, more than one year after the cut-off date. Therefore, your motion for postconviction relief is time-barred under Rule 61(i)(1).

The bar to relief under Rule 61(i)(1) does not apply to a claim that "the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[3] The fundamental fairness exception, as set forth in Superior Court Criminal Rule 61(i)(5), is a narrow one and has been applied only in limited circumstances..."[4] For example, the exception has been applied where the right relied upon was recognized for the first time after a direct appeal.[5] This exception may also cover a claim that there has been a mistaken waiver of important constitutional rights in exchange for a guilty plea.[6] You have not raised a colorable claim that requires consideration under this exception.

The cocaine was first tested by Daneshgar. However, when it became apparent that he would not be available for trial, the State of Delaware (the "State") had the cocaine tested by Josephine

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[2] Superior Court Criminal Rule 61(i)(1).

[3] Superior Court Criminal Rule 61(i)(5).

[4] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[5] *Younger*, 580 A.2d at 555, *citing Teague v. Lane*, 489 U.S. 288, 297-99 (1989).

[6] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

Tengonciang ("Tengonciang"). Daneshgar and Tengonciang both prepared "Controlled Substances Laboratory Reports." Tengonciang testified at trial and was cross-examined by your attorney. The State only initially sought the admission of Tengonciang's report. When your attorney cross-examinied Tengonciang, he pointed out that Daneshgar had described the cocaine as "white powder" in his report, while Tengonciang had described it as a "chunky off-white substance" in her report. Thus, it was your own attorney that sought to use Daneshgar's report to raise a question about Tengonciang's testimony by pointing out that she and Daneshgar described the cocaine differently. The State then sought the admission of Daneshgar's report so the jury could see that he also described the substance tested as "crack." Your attorney objected to the admission of Daneshgar's report. I overruled the objection, reasoning that since the State and your attorney had already discussed the report at some length, the admission of it was appropriate.

Given that your own attorney used the information in Daneshgar's report to help you, the "miscarriage of justice" exception is not applicable because there is nothing in your claim that even hints of a constitutional violation which would undermine the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction. Therefore, I have denied your second motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley